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before the

SUBCOMMITTEE ON COMMERCE, TRADE, AND

CONSUMER PROTECTION

COMMITTEE ON ENERGY AND COMMERCE

U.S. HOUSE OF REPRESENTATIVES

on

H.R. 2048, THE MOTOR VEHICLE OWNERS'

RIGHT TO REPAIR ACT OF 2005

May 17, 2006

THE MOTOR VEHICLE OWNER'S
RIGHT TO REPAIR ACT OF 2005 (H.R. 2048)

TESTIMONY OF NANCIE G. MARZULLA
On behalf of the Coalition for Auto Repair Equality in Support of H.R. 2048

Before the House Subcommittee on Commerce, Trade, and Consumer Protection

May 17, 2006

Thank you Mr. Chairman and Members of the Subcommittee. I am pleased to be here today to testify in support of H.R. 2048, the Motor Vehicle Owner's Right to Repair Act on behalf of the Coalition for Auto Repair Equality (CARE). CARE is a non-profit organization representing companies in the $200 billion-a-year, five million employee aftermarket industry. CARE's members operate businesses at 34,820 locations throughout the United States. Of these, 15,270 are automobile repair facilities. CARE's members also include companies that sell replacement parts to "do-it-yourselfers" or independent repair facilities.

Second only to a home, the automobile is the most expensive thing a consumer buys. A motor vehicle is quintessentially a consumer product that must be regularly maintained and repaired in order to operate safely and properly. For example, brakes wear out and must be replaced. Likewise, transmissions become worn and need repair. Finally, even engine parts wear out and must be continually serviced and repaired. In short, virtually any component of an automobile will wear out and need replacement or service over the useful life of a vehicle.

The American automobile owner has long enjoyed the right to choose by whom, where, and when to have his or her vehicle diagnosed, serviced, and repaired without this choice being dictated by the automobile's manufacturer. This right to repair is something

the vehicle owner buys at the time he or she purchases the automobile, and this freedom of choice is the American way of car ownership. The car belongs to the owner, and he or she may repair, service, improve or change accessories as desired. Such choice allows the vehicle owner to develop relationships with local or small independent repair shops. Likewise, the owner can shop around, and search for and compare prices or hours of operation. The owner can also choose the brand and quality of fluids, filters, batteries, tires and other replacement parts he or she wishes to install and, if he or she is talented enough, can install them. If the automobile manufacturers have their way, however, this proud American tradition of auto ownership ability to choose who and where an automobile will be repaired will be as commonplace as a horse and buggy.

This is because automobile manufacturers are increasingly using technology to successfully "lock out" automobile owners from maintaining and repairing their vehicles. Thus, even such seemingly simple matters as determining what a light on a dashboard means requires a trip to the dealership. Modern automobiles contain computers that control many components such as the braking system, the steering mechanism, air bags, ignition, and the climate control system. Lacking the ability to talk to the vehicle's computers, the owners or their auto technicians cannot begin to diagnose, service, or repair modern vehicles. Thus, increasingly, manufacturers are forcing vehicle owners to go to only one place for their service and repairs, to automobile dealers. This scheme, to destroy the competition for automobile service and repair, is anticompetitive. Moreover, forcing the vehicle owner to go back to the dealer for diagnosis, service, and repairs of the vehicle defies the settled and reasonable expectations of the American automobile consumer to choose who and where to have his or her vehicle repaired.

Although it is impossible to know the exact extent of the current problem, we estimate that independent repair technicians are turning away approximately 15 percent of all vehicles because manufactures have not released the information, information that they do release to their representatives. Because we are just now working with vehicles coming off their five-year warranty, the first generation of computer-controlled cars, we are seeing just the tip of the problem and we believe this number to be increasing each year as the auto fleet matures. This would be consistent with Automotive Service Association's testimony before the U.S. Senate in 2002 that 15 percent of all incidents of service are rejected due to lack of repair, which amounts to 161 million incidents of nonrepair, costing the industry 18 billion dollars.

A survey conducted by the Tarrance Group several years ago provides empirical evidence that 2 million Americans are annually forced to take their automobiles to manufacturers' representatives rather than independent repair shops. A poll of 800 owners or managers of automotive aftermarket businesses found that 59 percent have problems getting the necessary information to repair or provide parts for automobiles. That poll also found that 44 percent of aftermarket shops send one to six vehicles per month to a manufacturer representative for repair because of lack of information or tools, while another nine percent send over six vehicles per month. With approximately 178,000 independent repair shops in this country, that means approximately 2 million vehicles per year are diverted from independents to manufacturers' authorized representatives, a substantial disruption of the free market and a denial of the right of 2 million Americans to choose who will repair and service their automobile each year.

Increasingly, thus, the independent repair shop can no longer access the sophisticated on-board computers at all, and the automobile owner often has no choice but the manufacturer representative to service and repair the vehicle. This legislation will halt the demise of the independent repair shop, and preserve the vehicle owner's right to choose who will repair the vehicle.

I. The Consumer's Right to Repair

The right of the consumer to repair a piece of equipment that he or she purchased is bedrock law. In the landmark case, *Wilson v. Simpson*, 50 U.S. 109 (1850), the United States Supreme Court established the right to repair doctrine, holding that a consumer who purchases a new product or good has the right to repair or replace parts in that product or piece of machinery when they had become broken or worn-out.

Wilson involved a claim of patent infringement. In this historic case, an owner of a planning machine was sued for patent infringement because the owner had replaced worn-out cutter knives that were part of the machine. The Supreme Court held that the owner had a right to repair or replace parts of the machine, even if the machine, as a whole, was subject to a patent:

> It is the use of the whole of that which a purchaser buys, when the patentee sells to him a machine; and, when he repairs the damages which may be done to it, it is no more than the exercise of that right of care which every one may use to give duration to that which he owns, or has a right to use as a whole. . . . The right to repair and replace in such a case is either in the patentee, or in him who has bought the machine. Has the patentee a more equitable right to force the disuse of the machine entirely, on account of the inoperativeness of a part of it, than the purchaser has a right to repair, who has, in the whole of it, a right to use?

Id. at 123. The Court emphasized the fact that the planning machine was designed to last for several years, while cutter-knives, which are a part of the planning machine, were designed to last only sixty to ninety days. Thus:

> The right of the assignee to replace the cutter-knives is not because they are perishable materials, but because the inventor of the machine has so arranged them as a part of its combination, that the machine could not be continued in use without a succession of knives at short intervals. Unless they were replaced, the invention would have been but of little use to the inventor or to others.

Id. at 125.

Justice Oliver Wendall Holmes subsequently applied this doctrine in *Heyer v. Duplicator Manufacturing Company*, 263 U.S. 100, 101 (1923). In *Heyer*, the Supreme Court reviewed another patent infringement case involving the patent for "improvements in multiple copying machines." One part of that machine was a band of gelatine attached to a spool or spindle that fit into the machine and allowed a print to be multiplied up to about a hundred times. The Court upheld the right of the consumer to replace the bands explaining that "[t]he owner when he bought one of these machines had a right to suppose that he was free to maintain [its] use, without the further consent of the seller, for more than the sixty days in which the present gelatine might be used up. The machine lasts indefinitely, the bands are exhausted after a limited use and manifestly must be replaced." *Id*. at 101-02; *see also Schayer v. R.K.O. Radio Pictures*, 56 F. Supp. 903 (S.D.N.Y. 1944) (holding repair and maintenance of machine did not constitute patent infringement); *Westinghouse Electric & Mfg. Co*., 131 F.2d 406 (6th Cir. 1942) (holding that replacing parts of an "automatic progressive-feed stoker" did not constitute patent infringement); *F.F. Slocomb & Co. v. A.C. Layman Mach. Co*., 227 F. 94 (D. Del. 1915) (holding that both owner of machine and third party effecting repair of machine have right to replace parts of the machine); and, *Thomson-Houston Electric Co. v. Kelsey Electric Railway Sepcialty Co*., 75 F. 1005 (2d Cir. 1896)(upholding the right to replace trolley stands as not violative of patent holder's rights).

In 1935, the U.S. Court of Appeals for the Second Circuit again applied the "right of repair" to two separate suits involving the repair and use of replacement parts of a motor vehicle. In *Electric Auto Lite Company v. P. & D. Manufacturing Company*, 78 F.2d 700, 703-4 (2d. Cir. 1935), the court reviewed a lower court decision that found no patent infringement where the defendant was merely providing replacement parts for a patented ignition system in a motor vehicle. The Second Circuit upheld the lower court's decision and in so doing, left no doubt that a car owner has the right to repair his or her car by replacing broken or worn-out parts:

> A purchaser of a car having an ignition system made pursuant to any of these patents was entitled to have it repaired when necessary or replaced as to any of the parts in issue, in order to enjoy the continued usefulness of this ignition system. The car owner could repair or replace the part and would not be guilty of infringement if he did so. In like manner, he had the right to obtain the necessary part when his own need therefor arose. Indeed, the ignition apparatus is so designed and built as to make it possible to quickly and simply detach, for replacement purposes, the parts referred to and thus to meet the demands of wear or destruction.

Id. at 703.

In the second case, *General Motors Corporation v. Preferred Electric & Wire Corporation*, 79 F.2d 621 (2d Cir. 1935), the Second Circuit Court of Appeals again upheld a vehicle owner's right to replace the parts of an ignition system in his or her motor vehicle. The court stated that the right to repair or replace such parts is:

> an incident of the rightful use of the purchased car. After purchase, the car owner has an apparatus wholly free from the limits of a monopoly. That it is no infringement to make ordinary repairs or replacements that may reasonably be expected as necessary during the life of the car as a whole has been established by authorities.

Id. at 623 (citations omitted). The court further noted that such vehicle parts are "intentionally made so that they might be quickly detached and replaced when worn. They were relatively perishable and wore out before the device as a whole was worn and,

moreover, it was the custom of the trade to effect repairs by replacement of the defective parts." *Id*.

More recently, in *Aro Manufacturing Company v. Convertible Top Replacement Company*, 365 U.S. 336 (1961), the Supreme Court applied the right to repair doctrine in a patent infringement suit regarding a certain patented folding top for a convertible motor vehicle. The defendant manufactured and sold replacement fabrics to be put into the patented combination. The Court concluded that the replacement of the fabric was a "permissible repair." *Id*; *see also Hewlett Packard Co. v. Repeat-O-Type Stencil Mfg. Co*., 123 F.3d 1445 (Fed. Cir. 1997), *rehearing denied, suggestion for in banc declined* (Oct. 14, 1997)(quoting *Mitchell v. Hawley*, 83 U.S. (16 Wall.) 544, 547 (1872) ("[T]he rule is well established that the patentee must be understood to have parted to that extent with all his exclusive rights and that he ceases to have any interest whatever in the patented machine so sold and delivered."); *R2 Medical Systems, Inc. v. Katecho, Inc*., 931 F. Supp. 1397, 1442 (N.D. Ill. 1996) ("Once a patent owner sells a patented article, the purchaser also acquires an implied right to use and maintain that article continually. . . . The right to repair extends to the replacement of perishable components whose useful life is regularly exhausted by the proper use of the article."); *Sage Products, Inc. v. Devon Indus., Inc.* 45 F.3d 1575 (Fed. Cir. 1995) (holding doctrine of repair is not limited to temporary or minor repairs; it encompasses any repair that is necessary for maintenance of use or use of the whole of patented combination through replacement of spent, unpatented element.); *FMC Corp. v. Up-Right, Inc*., 21 F.3d 1073, 1077 (Fed. Cir. 1994)("[M]ere replacement of broken or worn-out parts, one at a time, whether of the

same part repeatedly or of a different part successively, is not more than the lawful right of the owner to repair his property.").

Although the right-to-repair doctrine is well established at common law, the use of computers in the modern vehicle truncates the vehicle owner's ability to exercise his or her right to actually repair the vehicle. Without the information necessary to access the computer in the vehicle, the owner cannot accurately diagnosis repair symptoms. Without the ability to access the computer in the vehicle, cheaper and more readily available replacement parts cannot be installed in a vehicle because the computer may be programmed to reject them, even though they are of superior quality. This bill updates the right to repair, bringing it into the computer age.

Nothing in H.R. 2048 authorizes anyone to reproduce or distribute any patented product or creative work, and all remedies for violations of patents and copyrights remain in force under the bill. The Copyright and Patent Clause of the United States Constitution provides as to copyrights: "Congress shall have Power … [t]o promote the Progress of Science … by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., Art. I, §8, cl. 8.

When granting a patent, the government allows a temporary monopoly, but the limits of that monopoly require public disclosure of the patent to take into consideration the public's interests in that invention. 69 C.J.S. Patents § 139. "The specification [for the patent] shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly

connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention." 35 U.S.C.A. § 112.

In *Eastman Kodak v. Image Technical Services*, 504 U.S. 451 (1992), where the Kodak company in 1985 had "implemented a policy of selling replacement parts for micrographic and copying machines only to buyers of Kodak equipment who use Kodak service or repair their own machines," the Supreme Court found that the trial court could make a finding that there was a violation of Section 1 of the Sherman Act by Kodak making such a "tying" arrangement. *Id*. at 458, 479. The actions by the auto manufacturers to keep independent service providers from obtaining the information necessary to repair automobiles are similar to the illegal "tying" actions of Kodak. Because the auto manufacturers are "tying" their market power from the auto and auto parts manufacturing market to their commerce in the repair markets, they are violating Sherman Antitrust Act, 15 U.S.C.A. § 1.

In *In re Independent Service Organizations Antitrust Litigation* ("Xerox"), 203 F.3d 1322 (Fed. Cir. 2000), the U.S. Court of Appeals for the Federal Circuit held that Xerox could refuse to sell its patented replacement parts to independent service repair organizations. The Federal Circuit acknowledged that intellectual property rights do not confer a privilege to violate antitrust laws, but went on to state that as a general rule, the antitrust laws do not prevent the owner of intellectual property rights from excluding others from use of its patented property. The court found that unless the antitrust defendant engages in illegal tying, Patent and Trademark Office fraud, or sham litigation, it could enforce its statutory intellectual property rights without violating the antitrust laws. *Xerox,* 203 F.3d at 1327.

"Notably, *Kodak* was a tying case when it came before the Supreme Court, and no patents had been asserted in defense of the antitrust claims against Kodak. Conversely, there are no claims in this case of illegally tying the sale of Xerox's patented parts to unpatented products." *Xerox*, 203 F.3d at 1327. Because our case with the auto manufacturers has related antitrust issues, the ruling in *Xerox* would not directly apply to our case with the auto manufacturers.

II. Role of the FTC in Protecting the Automobile Owners' Right to Repair

H.R. 2048 authorizes the Federal Trade Commission (FTC), which is the nation's lead consumer protection agency, to promulgate regulations ensuring that new motor vehicle owners have all the information necessary at their disposal for diagnosing, servicing, repairing and choosing the replacement parts for their vehicles. The Federal Trade Commission has in place broad statutory authority to enforce a variety of federal antitrust and consumer protection laws. The two separate missions of the FTC are part of the FTC's original mandate from Congress, the Federal Trade Commission Act of 1914, which granted the Commission the power to determine and prevent "unfair deceptive acts or practices in commerce" (consumer protection mission) and "unfair methods of competition (antitrust mission)." *See* 15 U.S.C.A. § 45(a)(1) (West 1999).

In 1938, the Wheeler-Lee Amendment broadened the FTC's jurisdiction and stated, in relevant part, that "[t]he Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." Wheeler-Lee Amendment, ch. 49, § 3, 52 Stat. 111 (1938).

The Magnuson-Moss Act of 1974 further expanded the FTC's power to promulgate substantive rules regarding consumer protection. As a result of the Magnuson-Moss Act, section 18 was added to the FTC Act authorizing the Commission to prescribe:

> (A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), and
>
> (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title). . . . Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

See 15 U.S.C.A. § 57a (West 1999). This Act also altered the language of section 5(a)(1) of the FTC Act which now reads: "[t]he Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in *or affecting* commerce and unfair or deceptive acts or practices in *or affecting* commerce." *See* 15 U.S.C.A. § 45(a)(1) (West 1999) (emphasis added to indicate amended language).

In addition to its original mandate to protect consumers against unfair or deceptive acts or practices under the FTC Act and its amendments, the FTC has also been given authority under several consumer protection statutes to prohibit specifically-defined trade practices and, as the present bill does, require disclosure of certain information to consumers. For example, under the Wool Products Labeling Act, 15 U.S.C. §§ 68-68j, the Fur Products Labeling Act, 15 U.S.C. §§ 69-69j, the Textile Fiber Products Identification Act, 15 U.S.C. §§ 70-70k, the Federal Cigarette Labeling and Advertising Act of 1966, 15 U.S.C. §§ 1331-1340, and the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-1461, the FTC has been given the authority to mandate content

disclosure in the labeling, invoicing and advertising of certain products. Similarly, under the Truth in Lending Act, 15 U.S.C. §§ 1601-1667f, the FTC has been granted the authority to require all creditors who deal with consumers to make certain written disclosures concerning finance charges and other aspects of financial transactions, and under the Fair Credit and Charge Card Disclosure Act, 15 U.S.C. 1637(c)-(g), the FTC can require credit and charge card issuers to provide certain disclosures in applications and solicitations.

The FTC has been given specific authority under the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667(f), to require that certain automobile lease costs and terms be disclosed. Also, under the Energy Policy Act of 1992, 42 U.S.C. §§ 6201, the FTC is authorized to issue requirements for the labeling of certain fuels and to issue other energy-efficient rules regarding lamps, transformers and small electric motors.

The purposes of the present bill are to protect American consumers from the unfair and deceptive practice of vehicle manufacturers in refusing to disclose certain information necessary for the repair, service and diagnosis of their motor vehicles and to ensure that American consumers have the opportunity to choose their own vehicle repair technician. The goals of this bill directly parallel the two missions of the FTC to protect consumers and encourage competition in commerce. Furthermore, as shown above, the FTC has been given a broad grant of authority, under the FTC Act, to accomplish its missions and promulgate corresponding rules and regulations. Similar to the above-mentioned statutes which authorize the FTC to prohibit certain trade practices, the present bill would authorize the FTC to prohibit the unfair practice of "locking out" consumers from their own vehicles by requiring disclosure of information necessary to

ensure that their vehicles are maintained and repaired accurately and safely. Although it will certainly impose some new duties on the FTC, we believe that these duties are neither foreign to the Commission nor beyond its competence.

III. Self-Regulation Has Failed to Protect the Consumer and to Preserve Competition in the Auto Repair and After-Parts Industry.

In order for a voluntary agreement to be effective, there must be effective enforcement and oversight of the agreement.

The close vertical marketing arrangement between automobile manufacturers and their authorized representatives makes it easy to build in the repair business as part of the price the consumer ultimately has to pay for the vehicle, and the profit which the manufacturer representative makes on the sale. This, in turn, increases the price the authorized representative can afford to pay the manufacturer. To the extent the manufacturer can also guarantee after-market warranty repair work to its representative by locking out independent repair shops and after-market parts producers, both the manufacturer and their representatives profit at the expense of the consumer. There is simply no economic incentive to allow independent repair shops to compete with manufacturer representatives for the same work, or to allow after-market parts to compete with the auto manufacturers' "genuine factory parts" sold at premium prices. The legitimate role of government is to intervene in the case of such market failures.

IV. A Model for This Information Disclosure Program Already Exists Under EPA's Mobile Source Rules

The successful EPA program requiring precisely the same kind of disclosures under the mobile source provisions of the Clean Air Act leaves little doubt that legislative proposal will work. Indeed, H.R. 2048 is directly modeled on the Clean Air Act Amendments, which insures the availability of the information necessary to repair the car's emissions or pollution control system. H.R. 2048 simply takes the non-discrimination provisions already applied to the car's emissions system, and applies them to all of the other systems in the motor vehicle.

In the 1990 Clean Air Act Amendments, Congress adopted a provision virtually identical to the present bill. That provision states:

> The Administrator, by regulation, shall require . . . manufacturers to provide promptly to any person engaged in the repairing or servicing of motor vehicles . . . any and all information needed to make use of the emission control diagnostics system . . . and . . . instructions for making emission related diagnosis and repairs. No such information may be withheld under section 7542(c) of this title [relating to trade secrets] if that information is provided (directly or indirectly) by the manufacturer to franchised dealers or other persons engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines. . . .

42 U.S.C. § 7521(m)(5). To implement this statute, EPA has issued regulations detailing what information automobile manufacturers must make available and specific procedures for doing so:

> Manufacturers shall furnish or cause to be furnished to any person engaged in the repairing or servicing of motor vehicles or motor vehicle engines . . . any and all information needed to make use of the on-board diagnostic system and such other information, including instructions for making emission-related diagnosis and repairs, including, but not limited to, service manuals, technical service bulletins, recall service information, data stream information, bi-directional control information, and training information, unless such information is protected by section 208(c) as a trade secret. No such information may be withheld under section 208(c) of the Act if that information is provided (directly or indirectly) by the

> manufacturer to franchised dealers or other persons engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines.

40 C.F.R. § 86.094-38(g)(1); *see also* 40 C.F.R. § 86.1808-01(f)(2)(i).

In addition, automobile manufacturers must provide this information "at a fair and reasonable price" to be determined by EPA. 40 C.F.R. § 86.094-38(g)(3); 40 C.F.R. § 86.1808-01(f)(7)(i). Any manufacturer that does not provide the required information at this price is deemed to have made the information unavailable. 40 C.F.R. § 86.094-38(g)(4); 40 C.F.R. § 86.1808-01(f)(8).

Each manufacturer must provide an index to its required information or provide the information on its website (40 C.F.R. § 86.094-38(g)(5); 40 C.F.R. § 86.094-1808-01(f)(3), (10)(2)), update the index or website (40 C.F.R. § 86.094-38(g)(5)(i); 40 C.F.R. § 86.094-1808-01(f)(3), (10)(2)), and maintain the index or website (40 C.F.R. § 86.094-38(g)(7); 40 C.F.R. § 86.094-1808-01(f)(7)(i), (10)(2)).

Manufacturers must provide the information at the same time they give it to their authorized representatives (40 C.F.R. § 86.094-38(g)(6)), and must mail certain requested information within one business day of receiving an order. 40 C.F.R. § 86.094-38(g)(9); 40 C.F.R. § 86.1808-01(f)(10)(2).

Like the FTC, EPA is not an information-gathering agency, but primarily a regulatory agency with expansive civil and criminal enforcement authority. Yet EPA has found no difficulty in administering this program and, as a consequence, consumers have had no problem getting their pollution control systems repaired.

H.R. 2048 would simply expand the consumer's right to repair to encompass all of the automobile's systems. We would expect that, when mandated by law, automobile

manufacturers will comply with the disclosure requirements (as they have under the Clean Air Act), minimizing any need for FTC involvement in enforcing these provisions.

I would be happy to answer any questions that you may have.

Respectfully submitted,

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